to an abdication by the court of its exclusive jurisdiction to try the issue as between the plaintiff and the appellant. In the circumstances, what the arbitrator had been asked to decide is the purely hypothetical question of the respondent's liability in the event of the plaintiff succeeding in his action against the appellant. Even if the arbitrator decides the question of indemnity in favour of the appellant, he would not be in a position to make an award in respect of a claim which is non-existent. Therefore, in my considered opinion, the notice of disclaimer by the respondent is bad. Since a claim under the contract had not arisen, the notice could amount to a notice of repudiation of the contract, in which case, the appellant would be entitled to take his claim to the court. On the other hand if the notice was meant to be a warning of their intention to disclaim liability in the event of a claim being made, then the time to refer the dispute to arbitration would begin to run only from the date when the claim is made or had arisen.

Now assuming that I am wrong, and that the time did begin to run from the date of the service of the notice, the appellant was left with no other choice but to implead the respondent as a third party. The purpose of impleading a person as a third party is to enable the court to decide all the issues between the plaintiff and the defendant on the one hand and between the defendant and the third party on the other, in one and the same action. When the respondent was served with the third party notice, they had the option of either waiving their right under the Scott-Avery clause or applying to set aside the third party notice. They did not apply to set aside the third party notice. They must, therefore, be deemed to have waived their right under the clause and agreed to submit their dispute for adjudication by the court. They cannot now be permitted to resile from that pisition. They cannot, for instance, now be heard to say that they had not agreed to submit their dispute for adjudication by the court, as they had all along intended to invoke the provisions of section 5 of the Arbitration Ordinance. The proof that the court has assumed jurisdiction lies in the fact, that the respondent cannot rely any more on the contract to refer the dispute to arbitration but on the indulgence of the court. When, therefore, the court stayed further proceedings to enable the parties to go to the court of an arbitrator, a situation arose which, in my opinion, is analogus to the situation which prevailed when the old Court of Chancery referred an issue for trial before a Court of Common Law.

Assuming once again that the notice of disclaimer is valid, it cannot be disputed that the period of limitation ran out while the hearing of the application by the respondent for a stay of proceedings was pending. In this connection, the court was blamed for the 'lamentable delay' in fixing an early date for the disposal of the application. There is nothing on the record to show that the blame lay on the court. When a case is adjourned generally for a date to be fixed, the first duty is upon the parties to apply to the registrar to fix an early date. There is nothing on the record to show what steps were taken by the parties to expedite the hearing. However, the argument that time would have been saved if the appellant had consented, in the first instance, to a stay of proceedings, is besides the point, since the appellant had in my opinion, good reason for opposing the stay at that stage of the proceedings. In the result, all the circumstances necessary to apply the old rule of Chancery is present in this case.

The appeal will therefore be allowed. The order of court dated the 2nd of June 1967 dismissing the motion dated 24th April, 1967 is hereby set aside and an order is hereby made in terms of the motion, as amended by extending the last date in regard to the lapse of time to the 13th day of June, 1968, with costs to the respondents. The appellant to have the cost of this appeal.

Barakbah L.P. and **Suffian F.J.** concurred.

Appeal allowed.

Solicitors: *Shook Lin & Bok; D. G. Ironside.*

TEOH GOR HUA v. CAMEL PLYWOOD CORPORATION LTD.

[O.C.J. (Chua J.) June 28, 1968]
[Singapore — Suit No. 1843 of 1966]

Master and Servant — Workers in a factory supplied by labour contractor — Whether they are servants of factory owner — Breach of statutory duty.

Factories — Statutory duty — Factories Ordinance, 1958, s. 22(1).

The plaintiff in this case claimed damages for personal injuries suffered whilst at work in the defendant's factory. The facts showed that the plaintiff was a worker supplied by the labour contractor who had entered into a contract with the defendants to supply the labour. It was alleged in the alternative to the claim based on negligence in this case that there was a breach of a statutory duty under the Factories Ordinance. The plaintiff was injured when he was struck in the eye by a piece of saw tooth which flew off from the band-saw on which he was working. It was alleged that the band-saw was not adequately fenced as required under section 22(1) of the Ordinance.

Held: (1) on the facts the plaintiff was not the servant of the defendant's and therefore the claim of the plaintiff for damages at common law must fail;

(2) the obligation under section 22(1) of the Factories Ordinance, is only to protect against direct injury by contact with the dangerous part of the

machine and not against injury from something that flies off from the machine.

Cases referred to:—

(1) *Performing Right Society Ltd.* v. *Mitchell & Booker Ltd.* [1924] 1 K.B. 762.

(2) *Honeywill & Stein Ltd.* v. *Larkin Bros. Ltd.* [1934] 1 K.B. 191.

(3) *Nicholls* v. *Austin (Leyton) Ltd.* [1946] 2 All.E.R. 92.

(4) *Close* v. *Steel Co. of Wales Ltd.* [1961] 2 All E.R. 953.

CIVIL SUIT.

S. Santhiran for the plaintiff.

Ng Wing Cheong for the defendants.

Cur. Adv. Vult.

Chua J.: The plaintiff in this case claims damages for personal injuries suffered whilst at work in the defendants' factory as a result of the negligence of the defendants' servant or agent and in the alternative arising out of the breach of statutory duty of the defendants under section 22(1) of the Factories Ordinance, 1958.

The short facts are these. The defendants are manufacturers of plywood and veneer. On the 4th March, 1966, the plaintiff was working with two other workmen at a band-saw in the defendants' factory sawing timber. While working the plaintiff was struck in the right eye by a piece of saw tooth which flew off from the band-saw. As a result the plaintiff lost the sight of his right eye.

The plaintiff's evidence as to how the accident occurred was shortly this. Three persons were working at the band-saw. The plaintiff and another person were at the front of the machine pushing the log core into the saw and one person (Teh Chin Guan) was at the rear of the machine pulling it. The log core had gone through the saw and Teh Chin Guan was pushing the log core back to the front for further sawing and in so doing the log core hit the saw which in turn struck the metal sawing platform and caused one of the teeth of the saw to break and fly out and hit the plaintiff's right eye.

The plaintiff alleges that he and Teh Chin Guan were servants of the defendants but the defendants deny this.

The plaintiff's evidence as regards his employment was shortly this. He had been working in various sawmills for eight years. Lim Chai Keng was the *kepala* employed by the defendants and Lim Chai Keng came to see him in Kuala Lumpur in February, 1966, and told him that the defendants' factory was short of a foreman and he, Lim Chai Keng, was instructed to look for one. Lim Chai Keng invited him to come to Singapore to work and said that he would get on the average $300 per month for 20 working days a month. He came to Singapore on the 12th February and Lim Chai Keng brought him to the defendants' factory where he was interviewed by an officer of the defendant company. He asked about his terms of employment and was told that there would be a minimum of 20 working days a month for which he would get as much as $300 per month and extra pay would be given in respect of additional work done and if he worked for less than 20 days a deduction of $1 per day would be made. The officer told him that he must work properly and obey the instructions of the defendants' officers. He started work the next day, the 13th February. Lim Chai Keng kept the record of the attendance and supervised the work of the workers, and was responsible for the sharpening of the saw blades. From time to time an officer of the defendants would also supervise the work of the workers and he, the plaintiff, was told by Lim Chai Keng to obey the instructions of that officer. Pay day was on the 5th and 20th of the month. On the 20th February he did not get his pay but he got an advance of $15 from Lim Chai Keng who also gave him some meal coupons. On the 4th March this accident happened. He agreed that he was not the only person called by Lim Chai Keng to work in the defendants' factory. He also agreed that when he was working in Singapore for 2 years previously he worked as an independent labourer.

The defendants say that the plaintiff and Teh Chin Guan were not employed by them but by Lim Chai Keng.

The evidence of Guo Shih Hung, the production manager of the defendant company, was shortly this. He was in charge of contracts with labour contractors, sales and purchase of logs. There were two kinds of workers in the defendants' factory, one consisting of workers directly employed by the defendants and the other of workers supplied by labour contractors. The workers employed by the defendants were concerned with the loading and unloading of logs and the packing of processed timber and the clearing of saw dust whereas the workers supplied by the labour contractors were concerned with the sawing of logs and sharpening of saw blades. The cutting of logs had to be done according to the defendants' specifications. On or about the 16th February, 1966, the defendants entered into a contract with Lim Chai Keng. The contract was in Chinese (Ex. D.8). The contract was signed also by Leow Ee Siang. This was done to enable Leow Ee Siang to collect the payments from the defendants on behalf of Lim Chai Keng. The contract covered three main points. They were:—

(1) the contract workers were to undertake indoor work consisting of cutting logs

according to the defendants' specifications and the sharpening of the saw blades;

(2) all arrangements relating to such contract workers were to be made by the contractor;

(3) the contract workers were to be paid at piece rate on the basis of quantity and sizes of timber produced.

The contract also provided for a minimum period of 20 days' work per month. The contract did not specify the number of workers the contractor was to employ. There were two payments made a month, one on the 5th and the other on the 20th. Payments were made on terms of unit rate for each type of timber produced in proportion to the quantity and made to Lim Chai Keng and based on the total output of all the workers of Lim Chai Keng. Transportation, board and lodging and medical expenses of the workers were not the concern of the defendants but the defendants were responsible for the premium due under the workmen's compensation policy. The defendants did not deal with the labourers of Lim Chai Keng but only with Lim Chai Keng himself. The defendants did not keep a record of the number of labourers supplied by Lim Chai Keng nor the particulars of the labourers. All the workers working at the eight band-saw of the defendants were Lim Chai Keng's labourers. There was a canteen at the defendants' premises; it was not run by the defendants but by a caterer who issued meal coupons to enable the labourers without ready cash to have meals on credit.

Lim Chai Keng's evidence was to this effect. He was a labour contractor in the timber section of the defendants' factory. Under the agreement Ex. D.8 he was to supply a team of labourers to cut timber in the defendants' factory. Payments were made to him half-monthly by the defendants and he would in turn pay the workmen according to the quantity of timber produced by each team of three workers at one machine and at the same rates paid by the defendants to him. He paid the workers at this rate — to the first worker $32 out of every $100 paid to the team, to the second worker $24 and to the third worker $20 and to the person who sharpened the saw $24. The plaintiff was the first worker. He was the person who sharpened the saw. The plaintiff was not paid a salary of $300 per month by the defendants. The average monthly income of the plaintiff would be between between $320 and $330. On the signing of the contract he had 10 workers; the number of workers was not fixed, it would depend on the quantity of timber to be cut. The division of work and labour was done by him and did not concern the defendants. The plaintiff was engaged by him to work under this contract and not by the defendants. The plaintiff was not interviewed by any officer of the defendants. He told the plaintiff that the plaintiff would be engaged under the contract labour system. He did not submit a list of the names of the workers to the defendants. The defendants did not have a supervisor to supervise the work of his workmen but there were two clerks of the defendants who would check the amount of timber produced every day. He had not been asked to dismiss any of his workers or to tell any of his workers to work harder or to replace any worker but if he was asked to do any of those things he could not refuse. The central provident fund contributions were his responsibility and not the defendants. It was he who supplied meal coupons to the plaintiff, he obtained the coupons from the canteen which was run by a contractor and not the defendants. The powers of supervision and dismissal were vested in him and not the defendants.

The evidence of Francis Tan, the office manager of the defendants, was shortly this. In accordance with the agreement with Lim Chai Keng the defendants paid the insurance premium to cover Lim Chai Keng's workmen under their workmen's compensation policy and the workers were classified in the policy as the contractor's employees.

It is clear from the evidence that the plaintiff and Teh Chin Guan were not employed by the defendants. The evidence shows that there was (and still is) a contract between the defendants and Lim Chai Keng under which Lim Chai Keng was to supply labourers to work at the defendants' eight band-saws and that the plaintiff and Teh Chin Guan were working in the defendants' factory under this contract at the time of the accident. The question arises whether the plaintiff and Teh Chin Guan were servants of the defendants.

It is convenient now to consider the test to be applied in deciding whether a man be a servant or an independent contractor.

The word "servant" is defined in *Salmond* on Torts, 14th Ed. p. 648 as "any person employed by another to do work for him on the terms that he, the servant, is to be subject to the control and directions of his employer in respect of the manner in which his work is to be done." In 25 *Halsbury*, 3rd Ed. p. 447, the characteristics of the relationship of master and servant are stated thus:—

> "Whether or not, in any given case the relationship of master and servant exists is a question of fact; but in general the relationship imports the existence of power in the employer not only to direct what work the servant is to do, but also the manner in which the work is to be done."

At p. 498 of the same volume of *Halsbury* the following passage appears:—

"To distinguish between an independent contractor and a servant, the test is whether or not the employer retains the power, not only of directing what work is to be done, but also of controlling the manner of doing the work."

The following passage in *Smith's* Master & Servant, 8th Ed. p. 254, is useful:—

"But though it is the employer's power of control that differentiates the position of servant from that of independent contractor, the employer may nevertheless reserve to himself by contract general rights of watching the progress of the works which the contractor has agreed to carry out for him, of deciding as to the quality of materials and workmanship, of stopping the works or any part thereof at any stage, and modifying and altering them, and of dismissing disobedient or incompetent workmen employed by the contractor, and yet he will not thereby of necessity render himself liable to third persons for the negligence of the contractor in carrying out the work."

MCardie J. in *Performing Right Society Ltd.* v. *Mitchell & Booker, Ltd.*,[1] said (at p. 767):—

"It seems, however, reasonably clear that the final test, if there be a final test, and certainly the test to be generally applied, lies in the nature and degree of detailed control over the person alleged to be a servant."

In *Honeywill & Stein Ltd.* v. *Larkin Bros. Ltd.*,[2] Slesser L.J. who delivered the judgment of the Court of Appeal, said (at p. 169):—

"The determination whether the actual wrongdoer is a servant or agent on the one hand or an independ nt contractor on the other depends on whether or not the employer not only determines what is to be done, but retains the control of the actual performance, in which case the doer is a servant or agent; but if the employer, while prescribing the work to be done, leaves the manner of doing it to the control of the doer, the latter is an independent contractor."

To decide whether the plaintiff and Teh Chin Guan were or were not servants of the defendants I have to consider the agreement Ex. D.8 as their relationship with the defendants rested upon this document.

The agreement provides that Lim Chai Keng was to provide the labour needed to cut the timber which the defendants required. The defendants certainly were not concerned with the number of labourers employed by Lim Chai Keng. What the defendants were concerned were the quantity and type of timber to be cut and the standard of the output and they could only give directions as to what work was to be done. Payment was to be made to Lim Chai Keng on the collective output of the labourers and the defendants were not concerned with the arrangement made by Lim Chai Keng with the labourers as regards payment to the labourers. The agreement provides that the cost of food, transport charges, provident fund, vacation, sick leave and medical charges of the labourers were the responsibility of Lim Chai Keng. The intention of the parties to the agreement is clear that the labourers were to be the employees of Lim Chai Keng and not the defendants.

Another matter to be taken into consideration is the power to dismiss. The defendants say that they have no power to dismiss the labourers working at the band-saws. It is, therefore, necessary to examine the terms of the contract in this respect.

Clause 6 of the contract provides as follows:—

"Rest and Work Stoppage

Party *B* (Lim Chai Keng) and his workmen shall not stop work or go slow as they please. Particularly when an order has to be fulfilled in time to catch a boat for shipment either extra work should be done or an extra gang should be engaged to work in order that production shall be co-ordinated. Otherwise Party *B* shall be held responsible for compensating Party *A*'s loss (the defendants'). If Party *B* and his workmen cannot attend work because of illness or because of some other matter they should apply for leave in advance and find a substitute/s. If a workman, before obtaining the "consent" of Party *A*, should go slow or not work hard or do anything detrimental to production, Party *A* shall order Party *B* to dismiss him for which Party *B* and his workman shall not make any claim against Party *A*. Otherwise either Party *A* or Party *B* may terminate the contract."

Clause 7 provides as follows:—

"Go slow, engaging workmen; dismissal

If Party *B* and his workmen should be guilty of misconduct, or of being careless in work or of deliberately causing damage to timber, machines or tools, Party *A* shall ask Party *B* to pay compensation according to the cost (of articles damaged) and to dismiss the guilty workman/workmen. If a workman is not hard working, Party *A* may ask Party *B* to replace him. (Party *B*) shall not dispute and shall not make any claim against Party *A*. Before Party *B* engages the workmen, a list of workmen's names shall first be submitted to Party *A* for examination. Party *A* shall have the right to reject any particular workman/workmen. During the currency of the contract, if and when Party *A* is of the opinion that any particular workman/workmen is/are not hard working, he/they shall be replaced and Party *B* shall not refuse."

Clause 8 provides as follows:—

"Trial period

This contract is tentatively fixed for one year. If production is co-ordinated, there shall be a trial period of one month as from the time the contract is entered into. If, during the trial period, Party *A* & Party *B* should regard it as being unsatisfactory, they may agree to make re-adjustment or terminate the contract. If Party *A* is of the opinion that certain workman/workmen is not capable of doing his/their work he may instruct Party *B* to dismiss that/those workman/workmen whose account shall be settled immediately and who shall be told to leave Party *A*'s factory. Party *B* shall act accordingly and shall not make any claim including claim for allowances."

It seems reasonably clear from the agreement that the defendants have no power to dismiss any of the labourers, such power is with Lim Chai Keng.

Taking all these circumstances into consideration I have come to the view that the plaintiff and Teh Chin Guan were not servants

of the defendants. The claim of the plaintiff for damages at common law therefore fails.

I now come to deal with the alternative claim of the plaintiff based on a breach of statutory duty by the defendants.

In the statement of claim the particulars of the breach of statutory duty of the defendants was pleaded as "contrary to section 25 of the Factories Act the defendants failed to completely encase the said machinery.", but at the trial the section relied upon is section 22(1) of the Factories Ordinance, 1958.

Section 22(1) provides:—

"Every dangerous part of any machinery, other than prime movers and transmission machinery, shall be securely fenced unless it is in such a position or such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced:

Provided that, in so far as the safety of a dangerous part of any machinery cannot by reason of the nature of the operation be secured by means of a fixed guard, the requirements of this subsection shall be deemed to have been complied with if a device is provided which automatically prevents the operator from coming into contact with that part."

The case of the plaintiff is that the defendants failed to fence the saw so as to prevent the danger of a tooth from the saw which has broken off from being ejected by the machine and causing injury.

For the defendants it is submitted that the obligation to fence under section 22(1) is an obligation only to protect against direct injury by contact with the dangerous part of the machine and not against injury from something that flies off from the machine.

On consideration of the terms of section 22 I am of the opinion that the obligation to fence imposed by subsection (1) is an obligation to provide a guard against contact with any dangerous part of a machine and that it does not impose any obligation to guard against dangerous materials or articles ejected from the machine (See *Nicholls* v. *Austin (Leyton) Ltd.*,[3] and *Close* v. *Steel Co. of Wales Ltd.*[4]).

From the evidence that I have, I am of the view that the defendants have complied with section 22(1) in that every precaution has been taken for the safe operation of the band-saw. It is true that the exposed part of the saw was not fenced but the nature of the operation prevents a guard to be fixed and there is no danger of the workmen coming into contact with the exposed saw as they would be standing some distance away from the saw when working and they do not have to get near the saw at all. No fencing would be sufficient to prevent a broken tooth of the saw from flying out.

This accident is unusual and it is not one which could have been foreseen by the defendants.

In the result the plaintiff's claim fails and is dismissed with costs.

Claim dismissed.

Solicitors: *J. Tan Chor Yong & Co.; Ng & Ng.*

WONG KIM NEO v. YEO BOON JOO

[O.C.J. (Gill J.) July 29, 1968]
[Malacca — Civil Suit No. 129 of 1965]

Contract — Agreement to sell house — Payment of more than 20% of agreed price — Failure to pay balance — Defendant in possession for over 3 years — Recission by vendor — Forfeiture of deposit.

The defendant agreed with the plaintiff by an agreement dated December 5, 1964 to purchase No. 74J Templer Avenue, Malacca at the price of $15,000. The deposit of $4,000 was to be paid on the signing of the agreement, a further sum of $1,000 on December 13, 1964, a sum of $3,000 by 24 equal monthly instalments of $125 each the first of such instalment to be paid on January 14, 1965 and the balance of $7,000 was to be paid towards the discharge of a loan due from the plaintiff to the Oversea Chinese Banking Corporation Ltd. on a security of the said premises together with interest falling due thereon every month as from December 14, 1964.

The defendant paid the deposit of $4,000 on signing of the agreement and a further sum of $900 on December 13, 1964 but he failed to pay any other amounts stipulated under the agreement. The plaintiff thereupon commenced proceedings against the defendant for specific performance of the agreement, damages and other consequential reliefs or alternatively for rescission of the agreement and the forfeiture of moneys paid to him. The court by way of specific performance ordered an account to be taken of what was due to the plaintiff and for the execution of the transfer by the plaintiff which was to be delivered to the defendant in exchange for the amount due under the agreement at a date to be fixed in the office of the assistant registrar. The defendant failed to appear on the appointed date. The plaintiff then applied by motion for the agreement of December 5, 1964 to be rescinded and the sum of $4,900 to be forfeited and for the defendant to deliver up vacant possession of the premises to the plaintiff.

Held: (1) the plaintiff was entitled to recission of the contract. *Hall* v. *Burnell*[1] applied;

(2) in view of the fact that the defendant had been in possession for nearly 3½ years it was just and reasonable that the sum of $4,900 be forfeited to the plaintiff.

Cases referred to:—

(1) *Hall* v. *Burnell* [1911] 2 Ch. 551.

(2) *Howe* v. *Smith* [1884] 27 Ch. D. 89.

CIVIL SUIT.

John Ang Soon Ho for the plaintiff.

Defendant in person.

Cur. Adv. Vult.

Gill J.: This was a motion by the plaintiff for an order that an agreement in writing dated